Filed 5/14/19 In re A.B. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re A.B., a Person Coming Under the Juvenile Court Law.	C086535
SACRAMENTO COUNTY DEPARTMENT OF CHILD, FAMILY AND ADULT SERVICES , Plaintiff and Respondent, v. T.N., Defendant and Appellant.	(Super. Ct. No. JD236951)

Appellant T.N., mother of the minor, appeals from the juvenile court's order denying her Welfare and Institutions Code[1] section 388 petition for modification, seeking placement of the minor and termination of jurisdiction, which was heard in conjunction

[1] Undesignated statutory references are to the Welfare and Institutions Code.

with the section 366.26 hearing terminating her parental rights. She contends the juvenile court erred in appointing counsel when she wanted to retain counsel, that her appointed counsel ineffectively represented her at the combined hearing, and that the juvenile court erred in denying her section 388 petition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In February 2016, mother was arrested and law enforcement placed the then two-year-old minor, A.B., in protective custody. In the months prior, law enforcement had received a number of reports of disturbances, fighting, and domestic violence between mother and her boyfriend, Dale H., at mother's home. Between October 2007 and September 2015, child protective services received multiple referrals regarding mother. The referrals included allegations of domestic violence with a former partner and in the presence of a half sibling, and general neglect. In one incident, mother was shoplifting with the minor and had a physical altercation with loss prevention staff while holding the minor. (Slip Opn., *supra,* at p. 2.)

The Department of Health and Human Services (now called the Department of Child, Family and Adult Services) (the Department), filed a section 300 petition alleging a failure to protect based on domestic violence in the presence of the child. (§ 300, subd. (b).) In April 2016, the juvenile court found the allegation true, specifically finding mother and Dale had a history of engaging in domestic violence in the presence of the minor, including Dale choking, punching, and attempting to strangle mother. Mother remained in a relationship with Dale, allowing the minor to be exposed to the domestic

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2 We take judicial notice of our unpublished opinion in mother's prior appeal (Evid. Code, § 452, subd. (d); *Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1433, fn. 2.) The facts and procedural background leading up to the December 20, 2017, ruling which was the subject of mother's prior appeal are largely taken from our opinion disposing of that prior appeal. (*In re A.B.* (Nov. 19, 2018, C086369) [nonpub. opn.] (hereafter Slip Opn.).)

violence. Six of 13 calls to law enforcement in the previous few months were related to domestic violence. The juvenile court declared the minor a dependent child, and ordered reunification services, including regular visitation and counseling concerning domestic violence issues. (Slip Opn., *supra,* at p. 2.)

In May 2016, Dale and mother had another altercation. Dale arrived at mother's friend's house, grabbed her, put her in his truck, and drove off. While in the truck, they continued to fight and Dale stabbed her. Mother was able to escape at a stop sign and law enforcement arrested Dale. Approximately two months later, mother showed up at the foster parents' home and stated she was going to kidnap the minor and make a complaint against the foster parents. In August 2016, the minor was moved to a placement with her paternal aunt in Nevada. (Slip Opn., *supra,* at pp. 2-3.)

By October 2016, mother had completed most of her parenting classes and a domestic violence program, and had begun general counseling and drug testing; but there continued to be concern about her behavior at the foster home, making the foster parents feel unsafe, and requiring the involvement of law enforcement. By March 2017, mother had completed parent education, general counseling, and domestic violence counseling. She had been drug testing and had completed two sessions of anger management counseling. She had also been referred to individual counseling, but had not yet started the sessions. (Slip Opn., *supra,* at p. 3.)

After the minor was placed out of state, visits were less often and primarily telephonic. Between August 2016 and March 2017, mother had two in-person visits with the minor. Prior to the first scheduled visit, mother showed up unannounced in the aunt's hometown and appeared at various addresses associated with the aunt, leaving a note for the minor. Mother and the aunt agreed to meet the next day in Reno, about a two-hour drive from the aunt's hometown; mother arrived three hours late for the visit. At another scheduled visit in Nevada, mother took the minor to a store and mother was stopped by a store clerk for shoplifting. With the minor in her arms, mother had an altercation with the

store clerk. Mother was cited for petty larceny. The social worker noted this behavior was consistent with mother's past behavior and indicated she had not benefitted from services. (Slip Opn., *supra,* at p. 3.) Mother attempted another unannounced visit with the minor in May 2017 and met the minor and the aunt at a fast food restaurant. The aunt left when she saw that mother was there with Dale. Mother missed scheduled visits with the minor in June. The Department reported mother had been inconsistent and "often unwilling to cooperate" with its efforts to schedule and coordinate visits. (Slip Opn., *supra,* at p. 4.)

Mother was arrested in June 2017. Law enforcement was attempting to contact Dale regarding warrants for his arrest. They received information he was staying with mother at her apartment. On the second day of their surveillance, they contacted mother who repeatedly denied Dale was in the apartment. Dale was found hiding under the sink and he resisted arrest. Once he was subdued, law enforcement arrested both Dale and mother. Mother apologized and admitted she knew Dale had been in the apartment and that she had hidden him from law enforcement. (Slip Opn., *supra,* at p. 4.)

The Department now recommended reunification services be terminated. The minor was doing well in her placement and was bonding with the aunt. By the 18-month review hearing in September 2017, mother had completed an anger management class and her individual counseling sessions. Mother's counselor indicated that while mother had shown significant improvement in some areas, her behavior showed a "disregard for the safety of her child by failing to disengage from an abusive relationship, failing to be consistent with visitation and inability to take responsibility for her actions through untruthful statements made in treatment." The counselor supported the recommendation to discontinue reunification services. (Slip Opn., *supra,* at p. 4.)

At the 18-month review hearing, the Department presented evidence mother had been the victim of yet another felony domestic violence incident on July 5, 2017. Mother reported she needed medical attention because she was swallowing her own blood and

both the apartment manager and mother called 911 for an ambulance. The police report indicated Dale had choked mother three times, and the final time she had blacked out. The apartment manager stated she saw Dale at the apartment two or three times per week. Mother told the responding officers she did not want Dale arrested, would not cooperate with law enforcement, and would not testify against him. (Slip Opn., *supra*, at pp. 4-5.)

At the review hearing, mother testified she had not seen Dale since June 20, 2017. She testified she had not called 911, and had not received medical treatment for any injuries on July 5, 2017. She also denied she had lied to law enforcement about his presence in the apartment, and denied she had made a statement apologizing to law enforcement for lying to them. The social worker testified that the fact that mother renewed her relationship with Dale just a few weeks after he was released from jail, and the nature of the domestic violence incidents, demonstrated mother had not benefitted from reunification services and the minor's safety would be in jeopardy if she were returned. (Slip Opn., *supra*, at p. 5.)

The juvenile court noted the basis of jurisdiction was the finding that mother had a history of domestic violence with Dale, and that mother had completed many services, including parenting classes, general counseling, domestic violence counseling, and individual counseling. The juvenile court acknowledged mother had demonstrated some progress and benefit; however, the evidence of the most recent incidents between Dale and mother in June and July 2017, as well as mother's false statements to law enforcement and untruthful testimony demonstrated a lack of respect for the law and law enforcement, showed mother being protective of her abuser, and mother placing her own interests above those of others, including the minor. The juvenile court also noted the similarities between the June 2015 shoplifting incident and the November 2016 incident and found this was further evidence of mother's willingness to ignore boundaries and the law, and to engage in altercations while her daughter was in her care. The juvenile court found there was a substantial risk of detriment to the minor's safety and well-being if she

were returned to mother. Mother's reunification services were terminated and the matter was set for a section 366.26 hearing on January 10, 2018. (Slip Opn., *supra*, at pp. 5-6.)

On November 29, 2017, mother was given permission to proceed in pro. per. Now representing herself, mother filed a section 388 petition for modification on December 14, 2017. Mother attached evidence demonstrating that since the 18-month review hearing in September 2017, she had completed an additional battery intervention course on October 24, 2017. She enrolled in that online course on October 20, 2017. She also attached e-mails in which she reported to a victim's advocate at the Department of Corrections and Rehabilitation (CDCR) that she had received threatening e-mails from Dale and told CDCR she had an active restraining order against him. At the December 20, 2017 hearing, mother stated this evidence demonstrated changed circumstances in that she had been able to integrate what she had learned from her services and take steps to ensure she and her daughter would be safe from Dale. As to the best interests, mother claimed that the minor had been crying herself to sleep ever since she was removed from mother's custody, asked why she was being given to the aunt, asked where "mommy's" room was going to be, and offered to take the bus home with mother. She claimed the minor just wanted to be back with her mother, so it was in the minor's best interests to be reunited with mother. (Slip Opn., *supra,* at p. 6.)

The Department alleged mother had not provided evidence of a restraining order; Dale was currently in prison, and mother had previously reengaged in a relationship with him soon after his release from prison; and the organization through which she obtained the certificate for the additional battery intervention course recommended supplemental psychotherapy sessions for all enrollees. The Department also stated this was not a program the Department uses or has approved for any purpose. The Department noted the minor had been in her current placement for 16 months and was doing well there. There was no evidence the minor was suffering due to the loss of relationship with

mother. Minor's counsel agreed with the Department and requested denial of the petition. (Slip Opn., *supra,* at p. 6.)

The juvenile court considered that the original allegation giving rise to the dependency jurisdiction included reports of domestic violence in the presence of the minor. The juvenile court noted the domestic violence problem was not specific to Dale, although he was a component of it; it also represented a significant risk of harm to the minor witnessing domestic violence. In this case, the severity of the problem was fairly substantial with numerous domestic violence episode reports over time, as far back as November 2015. Through the pendency of the case at various points, there were further allegations of domestic violence. The juvenile court acknowledged mother had completed one additional course, but stated it had no evidence of the extent to which mother had internalized any of the content of the program. The juvenile court noted the minor and mother had a significant bond, but the minor and the aunt also shared a significant relationship. The minor was four years three months old and had been placed with the aunt for 16 months. The juvenile court found mother had not met her burden to establish changed circumstances, and specifically had not shown she had successfully addressed her prior willingness to be in a relationship involving severe acts of physical violence against her. The juvenile court also found mother had not met her burden of establishing it was in the minor's best interest to be removed from her aunt's care, there was no showing of any discomfort by the minor in the placement, the placement had been stable and supportive, and the minor was bonded with the aunt. Accordingly, the juvenile court denied the modification petition (which was the subject of mother's earlier appeal and our prior opinion). (Slip Opn., *supra,* at p. 7.)

The juvenile court noted that the next court date was January 10, 2018, and that mother would need to review the section 366.26 report prior to the hearing. The court discussed different options for receiving the report and it was decided that the report would be mailed to mother and would also be made available to her next door by the

deputy county counsel. The court noted that mother left the courtroom during the middle of the court's discussion of service of the report on her, and was ignoring the efforts of the court to schedule hearings and assure mother obtained copies of the Department's report.

Two days later, mother filed another section 388 petition for modification, again requesting return of the minor and termination of jurisdiction. The petition again alleged she had a restraining order against Dale. It alleged mother had proof of the restraining order but she did not attach a copy of the restraining order. Instead, mother's exhibit referenced a temporary restraining order entered on September 18, 2017, which the Department provided and clarified had expired on October 6, 2017, when mother did not appear at the hearing. The petition also alleged that she had proof of mistakes contained in court reports and attached corrections to mother's perceived "mistakes." Also attached to the petition was a list of services she had completed in 2016 and 2017, and a letter to the court wherein mother explained what she had learned from her participation in services.

Mother appeared at the hearing on January 10, 2018. Mother complained to the juvenile court that she had just been handed a copy of the section 366.26 report and needed more time to review it. Mother stated the court had not made a final decision at the previous hearing as to how she would be served, and the court reminded her that she had left the hearing in the middle of the proceedings. The court also reminded mother that when it had granted her request to represent herself, it had admonished her that she was not to be disruptive, that leaving before the proceedings concluded was potentially disruptive, and that if she walks out of proceedings before they are concluded in the future, the court will continue with the proceeding, even in her absence. As the hearing progressed, mother became disruptive--repeatedly arguing with, confronting, and interrupting the judge--and the court admonished mother, again, about being disruptive. The juvenile court continued the hearing to January 22, 2018. Mother was ordered to

appear at the upcoming January 22, 2018 pretrial hearing and the January 26, 2018 combined sections 388 and 366.26 hearing.

Mother appeared at the January 22, 2018 pretrial hearing. She had filed her notice of appeal from the December 20, 2017 denial of her previous petition for modification and argued that the juvenile court had lacked jurisdiction to proceed a few days earlier, and argued at length, that the court was proceeding "illegally" and had no jurisdiction over the minor. After admonishing mother again about being disruptive, the court informed the parties it was proceeding with the pretrial hearing. At this point, mother insisted she needed to leave for an appointment.[3] Mother also refused to accept service of documents that were being handed to her by the Department.

Mother then announced that she would "like a lawyer now, so I need time to get a lawyer." The juvenile court asked opposing counsel how they proposed the court to handle mother's request, and all counsel agreed that mother should have counsel--with counsel for the Department pointing out that, based on her comments during the proceedings, that mother did not appear to have sufficient knowledge to represent herself and had become disruptive. The juvenile court informed mother that she "is free to bring her counsel" to the January 26, 2018 hearing and, "if she brings counsel, her counsel can make a request to continue the matter if that's appropriate." At the suggestion of minor's counsel, the juvenile court re-appointed mother's counsel, attorney Ganz, "in the interim," but reiterated to mother that she was "free to hire [her] own attorney" and that they would return on January 26 and hear more from her and/or her attorney at that time. Mother stated she needed to leave for an appointment and walked out of the hearing before its conclusion, leaving behind the Department's pretrial statement, the

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[3] Mother also stated she had appointments conflicting with the upcoming combined hearing date, as well.

Department's opposition to her petition for modification, and the copy of the social worker's report--all served on her by the Department earlier in the proceeding.

On January 26, 2018, mother had met with her re-appointed counsel before the hearing began, and she had also spoken to the bailiff. Mother informed the bailiff that she needed a continuance for 10 days to two weeks, that she needed to call witnesses for the hearing, and that she needed her own attorney, so she would not be returning to the courtroom. When the juvenile court called the matter, the following colloquy took place.

"THE COURT: All right. Also following up on something else that Deputy Codog shared. Mother indicated--well, mother appears to have indicated that she feels that she needs more time, i.e., seven days or seven to ten days.

"And Ms. Ganz is Ms. [N.]'s representative. What are your thoughts? It seems as if Ms. [N.] is suggesting that we continue the matter, although the details of which haven't--she hasn't shared with us directly.

"MS. GANZ: Yes, I agree that that sounds like her request. And I will submit the issue to the Court. I have represented Ms. [N.] for quite some time. I'm very familiar with her case, and I was provided with discovery right away after I was re-appointed. So I am prepared to go forward. I'll submit the issue on whether or not there's good cause to the Court. I don't think that having more time to--for me to speak with her is necessary on my behalf.

"THE COURT: Are there--I know that you were re-appointed recently, and that's potentially awkward or a difficult situation. Are there things that you think--steps that you could take or things that you could do that you have not been able to do that you would--that you would do if you had more time to--in which to do them, such as subpoenaing witnesses or something else?

"MS. GANZ: No. If the Court continues the case, then I will continue my ongoing investigation of this matter."

The juvenile court noted that at 2:18 p.m. that day (after the time set for the current hearing) mother had filed a "Complaint Regarding Performance of Court-Appointed Attorney" requesting the court relieve appointed counsel, and found mother was engaging in delay tactics. The court proceeded in mother's absence. No witnesses were called. Mother's attorney argued that mother's petition for modification should be granted. Minor's counsel and the Department argued in opposition, and the juvenile court denied the petition. Mother's counsel argued against termination of parental rights, based on the beneficial relationship exception to adoption. The juvenile court found the minor adoptable, no exception to adoption applied, and terminated parental rights.

DISCUSSION

I

Appointment of Counsel

Mother contends the juvenile court erred in appointing counsel for her at the January 22, 2018 hearing, when she wanted to retain counsel. She argues briefly that the juvenile court should have, instead, continued the already scheduled section 366.26 hearing to a date beyond January 26. But any claims originating from the juvenile court's actions at the January 22 hearing are not properly before us in this appeal.

As mother acknowledges in her statement of appealability, with the exception of post-1994 orders setting a section 366.26 hearing and posttermination placement orders, postdispositional orders are directly appealable, without limitation. (§§ 366.26, subd. (*l*), 366.28, subd. (b), 395.) This *includes* the order appointing counsel of which mother complains. "A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." (§ 395, subd. (a)(1).) "In a dependency proceeding the dispositional order constitutes a judgment." (*In re Megan B.* (1991) 235 Cal.App.3d 942, 950.)

Mother filed a notice of appeal seeking review of the "JV-180/388 01-26-2018." Her notice of appeal further clarifies that she is appealing the "JV-180/388 hearing

Request to Terminate Jurisdiction/Change Previous Court Order." This court does liberally construe notices of appeal. (Cal. Rules of Court, rule 8.100(a)(2) ["notice of appeal must be liberally construed"].) But while a liberal construction of this notice may include an appeal from the section 366.26 hearing of that same date, the order of which mother now complains was entered on January 22, 2018. Nowhere on the notice is any reference made to an order appointing counsel or to any other order entered on January 22, 2018. Thus, the juvenile court's January 22 orders confirming the January 26 hearing date and appointing counsel in the interim are not cognizable in this appeal.

II

Assistance of Counsel

Mother also contends her appointed attorney was ineffective for failing to ask for a continuance of the combined hearing and for failing to present additional evidence at the hearing. We reject her contention.

A claim of ineffective assistance of counsel may be reviewed on direct appeal when there is no satisfactory explanation for trial counsel's act or failure to act. (*In re N.M.* (2008) 161 Cal.App.4th 253, 270.) To prevail on such a claim, mother must demonstrate: "(1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficiency resulted in demonstrable prejudice." (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1540.) We must affirm the judgment unless the record "affirmatively establishes counsel had no rational tactical purpose for the challenged act or omission . . . ." (*Id*. at p. 1541.) In addition, we may reject mother's claim if she cannot show it is reasonably probable the result would have been more favorable to her but for trial counsel's alleged failings. (*In re N.M.*, at p. 270.) Thus, if mother fails to demonstrate prejudice, we need not examine whether her counsel's performance was deficient. (*Ibid*.)

Here, mother has not demonstrated that, had her attorney requested a continuance, the result would have been more favorable to her. First, mother assumes such a request

would have been granted, despite her refusal to personally appear at the hearing in violation of the court's order and despite the fact that her attorney could not have articulated good cause.[4] There is nothing in the record to suggest counsel knew what witnesses mother claimed she wanted to call, the relevance of those witnesses, or the existence of other evidence mother might want to present. There is also nothing in the record to suggest that counsel was aware of a reason for mother absenting herself from the hearing, other than what the bailiff had already reported to the court, that would have constituted good cause.

Even assuming counsel successfully obtained a continuance, mother has not demonstrated the result would have been more favorable. Nor has she demonstrated the result would have been more favorable if her attorney had presented evidence. There is no information as to what additional evidence mother could have presented. She did not identify the witnesses she allegedly wanted to call. She did not identify any additional evidence that would have been presented. Mother's position appears to be that some evidence (or any evidence) is better than no evidence. That declaration is not necessarily true. Indeed, at a previous hearing, mother's dishonest testimony was likely more harmful than helpful for her position. But, even assuming the presentation of some evidence would have been better, such generalities are far too speculative to establish prejudice.

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[4] To the extent mother suggests counsel should have told the court that *counsel* needed more time to prepare, that suggestion is factually and ethically flawed. Counsel, herself, did *not* require additional time to prepare. "An attorney has an unqualified duty to refrain from acts which mislead the court." (*Jackson v. State Bar* (1979) 23 Cal.3d 509, 513; Bus. & Prof. Code, §§ 6068, subd. (d), 6128, subd. (a); Rules Prof. Conduct, rule 5-200(B) [a member of the State Bar "[s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law"].) " ' "Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense." ' [Citations.]" (*Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 330.)

Since mother has not established prejudice, we reject her claim of ineffective assistance.

To the extent that mother assigns counsel's failure to file a writ petition in connection with the order setting the section 366.26 hearing as an additional instance of ineffective representation, mother makes no effort to establish that such a petition would have been meritorious. Thus, she again fails to establish prejudice.

Since mother has not established prejudice in connection with any of her claims of ineffective assistance of counsel, we reject her contentions.

III

Petition for Modification

Mother contends the juvenile court abused its discretion when it denied her December 22, 2017 petition for modification, which requested return of the minor and termination of dependency jurisdiction. Mother argues that, under the totality of the circumstances, she met her burden to establish new evidence or changed circumstances. Her contention fails.

Section 388 permits modification of a dependency order if the moving party demonstrates a change of circumstance or new evidence and if the proposed modification is in the best interests of the minor. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.) The party petitioning for modification has the burden of proof by a preponderance of the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48.) A petition to modify the court's order pursuant to section 388 "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Here, the evidence mother presented was not new. It had been proffered in connection with the previous petition for modification, which had been denied two days earlier. Mother still represented that she had obtained a restraining order against Dale, but still did not have proof of the order. She had provided the court with a list of several "mistakes" in prior reports, however none of those mistakes related to her ability to safely

parent and protect the minor. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451 [change of circumstances or new evidence must be of a significant nature].) She had not participated in any new services. And she provided no new information as to why the proposed change would benefit the minor. She stated that the minor loves her and represented that the minor had made up a story when she was three years old that she would come home with mother on the bus, but that was the same story mother had provided the court in connection with her earlier petition for modification.

As we explained in detail in our prior opinion (Slip Opn., *supra*), the juvenile court did not abuse its discretion in denying mother's petition for modification based on this evidence. For these same reasons, the juvenile court did not abuse its discretion here.

The only new evidence presented in her latest petition was a three-page written statement, which can best be described as a letter to the court attempting to explain how mother believes she has learned from her participation in services and what she wants for herself in life. In this letter, mother states she discovered she enjoys learning, intends to continue to "better" herself, is working every day on becoming a better parent, and now feels her life has a meaningful purpose. She also claimed to have contacted the prison victim advocate department and reported that she has an active restraining order against Dale and, since that time, had not received any mail from Dale.

This letter, even in conjunction with the earlier presented evidence, is simply insufficient to show changed circumstances. Moreover, the simple fact that the minor loves mother and that the three year old made up a story about going home with mother on a bus, does not amount to sufficient evidence that the proposed order, placing the minor with mother and terminating jurisdiction, was in the minor's best interests. The minor had been placed with her paternal aunt and uncle since August 2016. She had adjusted well, was bonded to her aunt and uncle, and referred to them as "mommy" and "daddy." The aunt and uncle were committed to providing permanency through

adoption. Thus, mother failed to establish that the proposed order was in the minor's best interests.

In sum, the juvenile court did not abuse its discretion in denying mother's petition.

DISPOSITION

The orders of the juvenile court are affirmed.

/s/
BLEASE, Acting P. J.

We concur:

/s/
HULL, J.

/s/
DUARTE, J.